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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA Commercial Mortgage Company
06-10725 – Lead Case

USA Capital Realty Advisors, LLC
06-10726

USA Capital Diversified Trust Deed Fund, LLC
06-10727

USA Capital First Trust Deed Fund, LLC
06-10728

USA Securities, LLC
06-10729

Debtors.

Jointly Administered
Chapter 11 Cases
Judge Linda B. Riegle Presiding

**MOTION FOR LEAVE TO FILE
SECOND AMENDED OBJECTION
AND COUNTERCLAIM**

Affecting:☐ All Cases**or Only:**☒ USA Commercial Mortgage Company☐ USA Capital Realty Advisors, LLC☐ USA Capital Diversified Trust Deed Fund, LLC☐ USA Capital First Trust Deed Fund, LLC☐ USA Securities, LLC

Date: January 24, 2007

Time: 9:30 a.m.

The USACM Liquidating Trust (the “USACM Trust”) moves for leave to file the proposed Second Amended Objection and Counterclaim to Claim No. 1366 (“Claim”) filed by Los Valles Land & Golf, LLC (“Los Valles”), attached hereto as Exhibit 1. The USACM Trust also moves this Court, pursuant to Fed. R. Civ. P. 13(h) and 20, and Bankr. R. 7013 and 7020, to add Dan S. Palmer Jr. (“Palmer”) as a counterdefendant, and to convert this claim to an adversary proceeding pursuant to Bankruptcy Rules 3007 and 7001. This motion is timely.¹

¹ Under the parties’ Amended Standard Discovery Plan (DE 5366), approved by the Court (DE 5383), the parties were to file amended pleadings or seek to join additional parties by December 15, 2001. However, the parties stipulated to extend the deadline for filing

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1 On March 3, 2004, USA Commercial Mortgage Company (“USACM”) entered into
2 a Loan Agreement and other agreements pursuant to which USACM arranged for a loan to
3 Los Valles in the initial principal amount of \$10,000,000. The loan was secured by a deed
4 of trust on real property located in Los Angeles County, California. The loan was
5 intended to finance a 209 lot residential subdivision. Palmer executed a separate personal
6 guaranty guaranteeing the loan.

7 Disputes arose between Los Valles and USACM over the payoff amount for the
8 loan. On October 6, 2006, USACM and Los Valles executed a Letter Agreement
9 compromising the parties’ competing claims regarding the amounts due to USACM under
10 the loan. Los Valles entered into the Letter Agreement with the Debtor in possession.

11 Under the Letter Agreement, USACM agreed to release the deed of trust on the
12 subject property. For its part Los Valles agreed to immediately pay the principal and
13 interest due on the loan and to pay USACM additional amounts in the future. More
14 specifically, under the Letter Agreement, Los Valles agreed to pay USACM a “deferred
15 extension fee” of \$586,045.83 no later than December 31, 2007 and additional fees on
16 each lot sold by USACM. Palmer signed the Letter Agreement, personally guaranteeing
17 payment of those amounts.

18 In early November, 2007, counsel for Los Valles indicated that, pending the
19 outcome of its claim against USACM, Los Valles did not intend to make the \$586,045.83
20 payment due under the Letter Agreement by December 31, 2007 or any of the other
21 payments. By letter dated December 4, 2007, USACM’s attorney wrote to counsel for
22 Palmer and asked him to verify that Palmer would make the \$586,045.83 payment as the
23 guarantor. Palmer’s counsel has indicated that he is researching Mr. Palmer’s defenses on
24 the guarantee and would provide no indication whether or not Palmer would make the
25 \$586,045.83 by December 31, 2007. Los Valles’ and Palmer’s expression of their intent
26 not to perform constitutes an anticipatory repudiation of the Letter Agreement entitling the

amended objections to December 21, 2007 and the Court granted that stipulation. *See* DE 5488 and 5501.

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1 USACM Trust to bring an immediate action for breach and accelerate its damages.

2 *Finnell v. Bromberg*, 79 Nev. 211, 225, 381 P.2d 221, 228 (Nev. 1963).

3 The USACM Trust moves the Court for leave to file a counterclaim against Los
4 Valles for anticipatory repudiation of its obligations under the Letter Agreement. *See* Fed.
5 R. Civ. P. 15(a) (“a party may amend the party’s pleading only by leave of court or by
6 written consent of the adverse party; and leave shall be freely given when justice so
7 requires.”); Bankr. R. 7015. Additionally, the USACM Trust moves, pursuant to Fed. R.
8 Civ. P. 13(h), made applicable to this proceeding by Bankr. R. 7013, and Fed. R. Civ. P.
9 20, made applicable to this proceeding by Bankr. R. 7020, for leave to add Palmer as a
10 counterdefendant for his anticipatory repudiation of his obligations as personal guarantor
11 under the Letter Agreement. The counterclaim against Palmer arises out of the transaction
12 that is the subject matter of Los Valles’ Claim, i.e., the breach of the Letter Agreement.

13 In the interests of judicial economy and to avoid having to try the parties’
14 obligations under the Letter Agreement twice, the USACM Trust asks the Court to grant
15 this motion rather than require that the USACM Trust file a separate adversary proceeding
16 against Los Valles and/or Palmer and ask the Court to consolidate that proceeding with
17 this case. *See* Bankr. R. 7013 (“A trustee... who fails to plead a counterclaim... when
18 justice so requires, may by leave of court amend the pleading, or commence a new
19 adversary proceeding or separate action.”). Discovery is in its early phases and no party
20 will be prejudiced if the Court grants the requested leave.

21 In conclusion, the USACM Trust respectfully requests that the Court:

- 22 1) Grant the USACM Trust’s motion for leave to file a Second Amended
- 23 Objection and Counterclaim against Los Valles;
- 24 2) Grant the USACM Trust’s motion for leave to file a Second Amended
- 25 Objection and Counterclaim naming Palmer as a counterdefendant; and
- 26 3) Convert the Claim to an adversary proceeding.

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1 RESPECTFULLY SUBMITTED December 21, 2007.

2 LEWIS AND ROCA LLP

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4 By /s/ RC (#006593)
5 Susan M. Freeman (*pro hac vice*)
6 Rob Charles
7 John Hinderaker (*pro hac vice*)
8 *Attorneys for USACM Liquidating Trust*

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1 COPY of the foregoing served via e-mail where
2 an e-mail address is listed, and if no e-mail
3 address is listed, then by first class, postage paid
US mail, this 21st day of December, 2007
addressed to:

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